STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

SHAE LYNN MULLINS,

Defendant-Appellant.

MSC No.: 157116

COA No.: 334098

Trial Ct. No.: 2015 – 000156 - FH

Defendant-Appellant's Supplemental Brief to Application for Leave to Appeal

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DEFENDANT- APPELLANT'S SUPPLEMENTAL BRIEF TO APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellant was convicted by jury verdict following trial in the Berrien County Circuit Court on April 18, 2016. Defendant-Appellant was sentenced on June 20, 2016. Defendant-Appellant timely filed her claim of appeal with the Court of Appeals on August 1, 2016. The Court of Appeals issued a published opinion affirming Defendant-Appellant's convictions on November 30, 2017. *People v Mullins*, 322 Mich App 151 (2017). Defendant-Appellant timely filed her application for leave to appeal to the Michigan Supreme Court on January 25, 2018. On November 16, 2018, the Michigan Supreme Court ordered oral argument on the application and instructed the parties to submit supplemental briefs addressing:

> (1) whether MCL 722.633(5), which criminalizes making a false report of felony child abuse, applies to non-mandatory reporters; (2) whether the phrase "intentionally *makes* a false report of child abuse or neglect" (emphasis added) is broad enough to encompass a circumstance in which a child is intentionally enlisted for the purpose of falsely accusing another of abuse or neglect, see MCL 750.411a; *United States v Giles*, 300 US 41, 48-49; 57 S Ct 340; 81 L Ed 493 (1937); and (3) whether MCL 722.633(5) must be read in light of the common-law doctrine of innocent agent. See Const 1963, art 3, § 7.

The Court has jurisdiction to hear this application, and the instant Brief is being submitted in accordance with the Court's November 16, 2018 Order.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER MCL 722.633, WHICH ESTABLISHES A COMPREHENSIVE FRAMEWORK OF CRIMINAL PENALTIES FOR ACTION OR INACTION BY MANDATORY REPORTERS, EXCLUDES NON-MANDATORY REPORTERS, AS THEY DO NOT HAVE AN OBLIGATION TO REPORT SUSPECTED CHILD ABUSE OR NEGLECT UNDER THE CHILD PROTECTION LAW?

Defendant-Appellant Answers: Yes.
Plaintiff-Appellee Answers: No.
The Trial Court Answered: No.
The Court of Appeals Answered: No.

II. WHETHER THE PHRASE "INTENTIONALLY MAKES A FALSE REPORT OF CHILD ABUSE OR NEGLECT" LIMITS THE APPLICABLE SCOPE OF MCL 722.633(5) TO ONLY THOSE WHO DIRECTLY MAKE A FALSE REPORT OF CHILD ABUSE OR NEGLECT TO THE DEPARTMENT?

Defendant-Appellant Answers: Yes.
Plaintiff-Appellee Answers: No.
The Trial Court Answered: No.
The Court of Appeals Answered: No.

III. WHETHER THE COMMON-LAW DOCTRINE OF INNOCENT AGENT WAS SILENTLY IMPORTED INTO THE CHILD PROTECTION LAW WHEN THE LEGISLATURE CREATED A COMPREHENSIVE STATUTORY SCHEME THAT ABROGATED THE COMMON LAW BY IMPOSING MANDATORY DUTIES TO REPORT SUSPECTED CHILD ABUSE OR NEGLECT AND PENALTIES FOR FAILURE TO REPORT THAT NEVER EXISTED AT COMMON LAW?

Defendant-Appellant Answers: No.
Plaintiff-Appellee Answers: Yes.
The Trial Court Answered: Yes.
The Court of Appeals Answered: Yes.

STATEMENT OF FACTS

I. PROCEDURAL HISTORY

Defendant-Appellant Shae Lynn Mullins ("Mullins") was charged in a two-count complaint that was filed in the Berrien County Trial Court[1] on or about January 14, 2015. Appendix at 1a. Mullins was charged with one count of making false report of child abuse or neglect that would have constituted the felony of Criminal Sexual Conduct to the Department of Health and Human Services ("DHHS"),[2] contrary to MCL 722.633(5)(b), and one count of contributing to the neglect or delinquency of a minor child, contrary to MCL 750.145. These crimes allegedly occurred on November 18, 2013 in St. Joseph Township, Berrien County, Michigan. Appendix at 1a. The allegations against Mullins that formed the basis of the charges are that she told her daughter PD[3] to tell an adult a statement to the effect that PD's father "has hurt her and hurts her privates."

A preliminary examination was held before the Honorable Donna B. Howard on March 3, 2015. Appendix at 2a. Following the conclusion of the preliminary examination, Judge Howard took the matter under advisement to issue a written opinion on the People's Motion for Bindover on the felony charge. On March 13, 2015, Judge Howard issued a Preliminary Examination Opinion and Order denying the People's Motion for Bindover by finding that Mullins's alleged behavior did not fall under the meaning of MCL 722.633(5)(b) because Mullins did not herself or through her child actually make a false report to DHHS. Appendix at 21a-29a. Judge Howard compared MCL 722.633(5)(b), which establishes the offense filing a false report of child abuse or neglect that would constitute a felony, with MCL 750.411a, which establishes the offense of filing a false police report.

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[1] Berrien County has organized its district court and circuit court into one trial court of concurrent jurisdiction pursuant to local administrative order and approval of the Michigan Supreme Court.

[2] The record is inconsistent and often calls the Department of Health and Human Services ("DHHS") by its previous name, the Department of Human Services ("DHS"). This Application refers to the department by its current name—"DHHS"—throughout.

[3] PD is still a minor child, so she is referred to by her initials throughout this Supplemental Brief.

Appendix at 27a-28a. Judge Howard noted that MCL 750.411a establishes that not only is making a false report a criminal act but it also criminalizes the action of "intentionally caus[ing] a false report of the commission of a crime to be made." Appendix at 27a. Judge Howard noted that this additional language concerning "intentionally causing a false report . . . to be made" is absent from MCL 722.633(5)(b). Appendix at 27a-28a. Therefore, Judge Howard found that there was no evidence that Mullins had made a false report to DHHS and dismissed the offense without prejudice. Appendix at 29a.

The People filed a Motion for Reconsideration, which was denied. Appendix at 2a-3a. On April 17, 2015, the People filed an Application for Leave to Appeal to the Circuit Court. Appendix at 3a. The Honorable Angela M. Pasula was assigned to review the Application for Leave to Appeal. Appendix at 3a. Judge Pasula granted the Application for Leave to Appeal on June 9, 2015. Appendix at 4a. Oral argument on the appeal was held on August 7, 2015 before Judge Pasula, who took the matter under advisement to issue a written opinion and order. Appendix at 4a. On August 31, 2015, Judge Pasula issued an Opinion and Order Reversing Decision of the Trial Court Refusing to Bind Defendant Over for Trial. Appendix at 30a-45a. As a result of Judge Pasula's Opinion and Order, the felony charge was reinstated, and Judge Howard bound the matter over for trial following remand. Appendix at 45a.

Jury selection and the trial began on April 12, 2016. Appendix at 6a. Berrien County Assistant Prosecuting Attorney Steven P. Pierangeli (P67320) (hereinafter "Mr. Pierangeli") represented the People throughout the trial. Attorney Michael J. Cronkright (P52671) appeared on behalf of Mullins. Jury selection and openings were completed on April 12, 2016.

On April 13, 2016, the People began presentation of their case-in-chief. The People called the following witnesses: PD, Linda Fish, Jody Maher, and Kevin Proshwitz. Appendix at 46a-47a.

On April 14, 2016, the People called the following witnesses: Louis Dominion, Cindy Wallis, Doug Kill, and Robin Zollar. Appendix at 89a-90a. Following the testimony of Robin Zollar, the People rested. Mullins then began presentation of her case-in-chief by calling Jon Klepper and Jordan Mullins as witnesses. Appendix at 90a.

Trial continued on April 15, 2016 with the testimony of Brooke Rospierski and Mullins. Appendix at 109a-110a. Following the conclusion of Mullins's testimony, Mullins rested.

The trial concluded on April 18, 2016. Appendix at 158a-159a. The People re-called Kevin Proshwitz as a rebuttal witness, and both parties presented closing arguments. Appendix at 159a. Following jury instructions and deliberations, the jury returned a verdict of guilty on both counts.

Mullins was sentenced on June 20, 2016 to 7 days jail and was placed on probation for 2 years. Appendix at 20a. Mullins timely filed her claim of appeal with the Court of Appeals on August 1, 2016. On November 30, 2017, the Court of Appeals issued a published opinion affirming Mullins's convictions. *People v Mullins*, 322 Mich App 151 (2017). This timely application for leave to appeal to the Michigan Supreme Court followed on January 25, 2018. On November 16, 2018, the Court ordered oral argument and the instant supplemental briefing on the application.

II. FACTUAL HISTORY

A. Background of the Parties

This case is an unfortunate tug-of-war between two parents and their daughter. PD, DOB 1-5-2006, is the biological daughter of Mullins and Louis Dominion ("Mr. Dominion"). Appendix at 111a. Mullins and Mr. Dominion have been engaged in virtually constant litigation concerning PD since approximately 2008. Appendix at 112a. As such, the majority of the facts are highly disputed among the parties. A considerable amount of the testimony at trial was dedicated to Mullins and Mr. Dominion's history as it concerns PD. Therefore, some brief background is necessary.

Mullins was PD's primary caregiver from the time of her birth until 2008, when Mr. Dominion established parentage and custody through legal proceedings. Appendix at 113a-114a. At that time, Mr. Dominion began with some supervised parenting time with PD, which gradually transitioned to unsupervised. Appendix at 115a-116a.

Following Mr. Dominion's first weekend of unsupervised parenting time with PD in February 2008, Mullins testified that she observed some distressing behaviors out of PD and also observed redness and swelling on PD's vaginal area. Appendix at 117a-118a. In response, Mullins took PD to receive medical attention. Appendix at 119a. Due to the nature of PD's symptoms, CPS and the Michigan State Police were called to investigate by PD's treating physician or staff. Appendix at 120a. Mr. Dominion's parenting time with PD was suspended or otherwise not exercised pending the investigation. Appendix at 121a. During the investigation, CPS referred Mullins to take PD to Doctor Gusthurst at Bronson Hospital in Kalamazoo, Michigan. Appendix at 125a. The February 2008 case was eventually closed, and Mr. Dominion's unsupervised parenting time with PD resumed. Appendix at 98a; 122a.

In May 2008, following Mr. Dominion's exercise of weekend parenting time with PD, Mullins again observed the same redness and swelling in PD's vaginal area. Appendix at 123a-124a. In response to these observations, Mullins took PD to Bronson Hospital to see Dr. Gusthurst, who she believed to be a specialist. Appendix at 126a-127a; 149a. Again, medical personnel contacted CPS and/or the Michigan State Police due to the nature of PD's symptoms. Appendix at 127a. Mr. Dominion's parenting time with PD was suspended or otherwise not exercised for a period of time while this matter was investigated. Appendix at 128a. Mullins testified that her goal was to protect and prevent PD from being hurt. Appendix at 129a. Ultimately, CPS and Michigan State Police closed their investigations of the May 2008 matter. Appendix at 97a.

In September 2008, Mullins again observed redness and swelling in PD's vaginal area after Mr. Dominion had exercised parenting time. Appendix at 130a. Mullins took PD for medical treatment, and CPS and Michigan State Police got involved for a third time. Appendix at 131a.

Following this third incident in 2008, DHHS filed an abuse and neglect petition to take jurisdiction over PD.[4] During the trial, Mr. Pierangeli elicited extensive testimony regarding this petition involving Mullins as a respondent and another supposed petition concerning Mullins as a respondent, including testimony to suggest that Mullins would not benefit from parenting programming from DHHS. Appendix at 81a-88a, 91a-92a, 98a-100a, 103a, 131a-132a, 150a-158a. Following this third incident in 2008, Mullins and Mr. Dominion's custodial relationship with PD changed such that Mr. Dominion had primary physical custody and Mullins had parenting time every other weekend and week on/week off in the summer. Appendix at 133a.

The parties proceeded on this parenting time and physical custody arrangement until November 18, 2013. These events form the necessary background to give context to the events alleged in Complaint.

B. Events of November 18, 2013 and Aftermath

The criminal charges against Mullins in this matter stem from the events surrounding Monday, November 18, 2013. Appendix at 1a. Mullins had parenting time with PD beginning on Friday, November 15, 2013 until Monday, November 18, 2013, when Mullins dropped PD off at school. Appendix at 134a-139a. At this time, PD was attending Lake Michigan Catholic School in St. Joseph Township, Berrien County, Michigan for 2nd grade. Appendix at 50a. Mullins lived in the Battle Creek, Michigan area at the time and would drive PD to school on Monday mornings. Appendix at 141a.

Mullins and her boyfriend, Jon Klepper ("Klepper"), drove PD to school this morning, who both testified that PD slept the entire drive. Appendix at 106a-108a, 140a-141a. They arrived at the

[4] This matter was litigated heavily and even reached this Court.

school just as class was starting, and Mullins took PD into the school to see her to her classroom. Appendix at 141a-143a. Mullins left the school shortly thereafter. Appendix at 144a-147a.

It is undisputed that PD had a private conversation with her teacher, Linda Fish ("Ms. Fish"), at approximately 11:15 a.m. Appendix at 62a-67a. It is also undisputed that PD told Ms. Fish, "Lou Dominion hurts me and has hurt my private parts." Appendix at 65a-66a. In response to that statement, Ms. Fish asked PD if anyone had told PD to say that to her and PD responded by saying, "God." Appendix at 68a. Ms. Fish followed up by asking PD whether she had been "spanked," and PD responded by saying, "yes." Appendix at 69a. It is also undisputed that in response to PD's statements, Ms. Fish reported these statements to her principal, Jody Maher, who made a report to DHHS, which opened a CPS investigation into the matter. Appendix at 70a-71a, 74a-75a.

Kevin Proshwitz ("Mr. Proshwitz"), an investigator from CPS, was assigned to the file and made contact with Mr. Dominion later that day and requested that Mr. Dominion return home immediately. Appendix at 78a. On the drive back to Mr. Dominion's home, Mr. Dominion was visibly upset and asked PD "what your mom (Mullins) promised you this time." Appendix at 53a, 93a. Upon arriving at Mr. Dominion's home, Mr. Dominion and PD were met by Mr. Proshwitz and his assistant from DHHS. Appendix at 79a. After meeting with Mr. Dominion, Mr. Proshwitz met with PD in her bedroom at Mr. Dominion's suggestion. Appendix at 80a. Following the interview and the investigation, Mr. Proshwitz testified that he was concerned that Mullins had told PD to lie—an allegation that was specifically suggested to PD by Mr. Dominion just before PD's conversation with Mr. Proshwitz. Appendix at 61a. Notably, Mr. Proshwitz asked PD a leading question as to whether anyone had told PD to tell a lie. Appendix at 160a. PD's response to this question was that Mullins had told her to lie. Appendix at 160a.

PD testified at trial, inconsistently at times, that Mullins had told her on two to three separate occasions over the course of the weekend preceding and Monday, November 18, 2013 that if PD said

bad things about Mr. Dominion that they would get to spend more time together. Appendix at 48a. PD testified that she wanted to spend more time with Mullins. Appendix at 49a. PD testified that her mom had told her what to say about Mr. Dominion on two separate occasions—once in the car on the drive to school on the morning of November 18, 2013 and the night before in Mullins's bedroom. Appendix at 51a. PD denied any conversation with Mullins occurring in the coat room at the school, contrary to her testimony at the preliminary examination, but she changed her story to include a third instance after she was impeached with her prior testimony at the preliminary examination. Appendix at 56a-68a. PD also testified that private parts were "[b]oobs, butt, and your other one." Appendix at 59a. PD also testified that Mr. Dominion had spanked her in the past. Appendix at 54a-55a.

Mullins and Klepper denied that any conversations with PD on the drive to school in their testimony, and Mullins also repeatedly denied that she ever told PD to tell anyone any allegations concerning Mr. Dominion. Appendix at 108a, 148a.

On November 21, 2013, PD was forensically interviewed by Brooke Rospierski ("Ms. Rospierski") at the Children's Assessment Center. During this interview, Ms. Rospierski asked PD why she decided to tell Ms. Fish the allegations concerning Mr. Dominion, to which PD responded, "Because I knew I could and it was okay to." Appendix 163a. At no point during the forensic interview did PD tell Ms. Rospierski that Mullins had told her to lie. Appendix at 164a.

Following closing arguments and deliberations, the jury returned a verdict of guilty on both counts. Mullins's timely appeal to the Court of Appeals followed. On November 30, 2017, the Court of Appeals issued a published opinion affirming Mullins's convictions. *People v Mullins*, 322 Mich App 151 (2017). This timely application for leave to appeal follows.

ARGUMENT

This Honorable Court should grant this application for leave to appeal and vacate Defendant-Appellant's convictions and reverse and remand this matter for a new trial because this matter presents several interesting questions of first impression that are of major jurisprudential import—particularly during this day and age. Namely, this case heavily concerns the appropriate roles, responsibilities, and the extent of accountability for mandatory reporters (and non-mandatory reporters) of suspected child abuse or neglect. This matter presents an opportunity for the Court to clarify those persons who are subject to penalties imposed by the Child Protection Law and to offer much-needed guidance related to the topic of mandatory reporters. The Court does not operate in a vacuum, and the topic of mandatory reporting of suspected child abuse or neglect has been a significant focus of the Michigan Legislature[5] and has also gained significant public interest. Moreover, as the opinion of the Court of Appeals is published in this matter, it carries precedential value, MCR 7.215(C)(2), and this case, therefore, "involves a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(3).

This Honorable Court should grant Defendant-Appellant's application for leave to appeal, vacate her convictions, and remand this matter for a new trial because (1) the crime of filing a false report of child abuse or neglect is only applicable to those who have a mandatory duty to report abuse or neglect by the plain language of the statute, MCL 722.633(5); (2) a person only "intentionally makes a false report of child abuse or neglect" when reporting directly to DHHS—not through 3 intermediaries; and (3) the doctrine of innocent agent is inapplicable, as the Child Protection Law created a comprehensive statutory scheme for mandatory reporting of suspected child abuse or neglect that never existed at—and indeed is contrary to—the common law. If Mullins prevails on any of these

[5] As of the filing of this Supplemental Brief, at least 3 public acts were enacted into law that modified or amended the Child Protection Law in 2018. *See* 2018 PA 56, 2018 PA 59, and 2018 PA 60.

issues, her convictions must be vacated and this matter must be reversed and remanded for a new trial.

I. THE CRIME OF FILING A FALSE REPORT OF CHILD ABUSE OR NEGLECT ONLY APPLIES TO THOSE WHO QUALIFY AS MANDATORY REPORTERS OF CHILD ABUSE OR NEGLECT UNDER THE PLAIN MEANING OF THE STATUTE, AND MULLINS WAS NOT A MANDATORY REPORTER.

Mullins was charged and convicted by jury verdict of violating MCL 722.633(5)(b)(ii) for purportedly intentionally making a false report of felony child abuse or neglect knowing that the report was false. However, even assuming *arguendo* that the People's theory of the case is true, Mullins's actions would not constitute a violation of MCL 722.633(5)(b)(ii) because the plain language of the statute only criminalizes the act of intentionally and knowingly making a false report of child abuse or neglect by a mandatory reporter and Mullins was not a mandatory reporter.

This issue was preserved because the issue of whether Mullins could be charged under MCL 722.633(5)(b)(ii) was extensively argued by both parties throughout these proceedings. The district court originally refused to bind over Mullins on this offense, the People appealed, and the circuit court reversed. Moreover, Mullins maintained her innocence on this offense and was convicted by jury verdict after trial. Therefore, this issue is preserved for appeal. Issues of statutory interpretation are reviewed de novo. *Stanton v City of Battle Creek*, 466 Mich 611, 614 (2002).

MCL 722.633(5)(b)(ii) states:

> A person who intentionally makes a false report of child abuse or neglect under this act knowing that the report is false is guilty of a crime as follows:
>
> (b) If the child abuse or neglect reported would constitute a felony if the report were true, the person is guilty of a felony punishable by the lesser of the following:
>
> (ii) Imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

Under the plain language of MCL 722.633(5)(b)(ii), only a person who intentionally makes a false report "under this act" knowing that the report is false is guilty of a crime. MCL 722.633(5)(b)(ii) is

part of the Child Protection Law. The Child Protection Law establishes a system of mandatory reporters of child abuse or neglect. MCL 722.623(1). For example, physicians, psychologists, school administrators, and teachers "who ha[ve] reasonable cause to suspect child abuse or child neglect shall make an immediate report to centralized intake [of the DHHS] by telephone, or, if available, through the online reporting system, of the suspected child abuse or child neglect." MCL 722.623(1)(a); MCL 722.622(e), (p).

It is undisputed that Mullins is not a mandatory reporter under MCL 722.623(1). The only provision of the Child Protection Law that could theoretically apply to Mullins is MCL 722.624. MCL 722.624 states, "In addition to those persons required to report child abuse or neglect under [MCL 722.623], any person, including a child, who has reasonable cause to suspect child abuse or neglect may report the matter to [DHHS] or a law enforcement agency." Thus, MCL 722.624 provides a permissive option for those who are not mandatory reporters to report suspected child abuse or neglect.

MCL 722.633(5) only criminalizes false reports of child abuse or neglect to DHHS that are intentionally made knowing that they are false "under this act." MCL 722.633 is part of the Child Protection Law. MCL 722.621. Therefore, only reports that are made "under the Child Protection Law" could potentially fall within the scope of MCL 722.633(5). The Child Protection Law establishes two different types of reporters of suspected child abuse or neglect—mandatory and non-mandatory. MCL 722.623(1); MCL 722.624. The difference between reporters is straightforward. MCL 722.623(1) establishes that those in certain professions, occupations, or roles have a statutory mandate to report child abuse or neglect to DHHS. These individuals are "mandatory reporters." On the contrary, any person who does not meet the definition of a mandatory reporter is a "non-mandatory reporter" and is permitted—not required—to make a report of child abuse or neglect to DHHS or law enforcement. MCL 722.624. By its plain language, MCL 722.624 seeks to make clear to DHHS or law enforcement

that they must accept reports of suspected child abuse or neglect from any source—not just from mandatory reporters.

The key differences between mandatory and non-mandatory reporters are: (1) mandatory reporters are required by statute to report suspected child abuse or neglect and (2) mandatory reporters can be held civilly and criminally liable for failing to report suspected child abuse or neglect. MCL 722.623(1); MCL 722.633(1), (2). Non-mandatory reporters have no obligation to report suspected child abuse or neglect and cannot be held civilly or criminally liable for failing to report suspected child abuse or neglect. *See* MCL 722.624; MCL 722.633(1), (2).

Since an essential requirement for criminal culpability MCL 722.633(5) is that the report must be made "under this act," i.e. under the Child Protection Law, the meaning of "under this act" is unclear as it relates to non-mandatory reporters. Since mandatory reporters have an affirmative obligation to report suspected child abuse or neglect, the term "under this act" in MCL 722.633(5) is clear in creating a situation where a mandatory reporter acts pursuant to the affirmative duties imposed under the Child Protection Law. Therefore, when a mandatory reporter makes a report of suspected child abuse or neglect that they are required to make by statute, they are ostensibly acting "under this act" within the meaning of MCL 722.633(5). However, the meaning of "under this act" in MCL 722.633(5) is unclear and ambiguous as it relates to non-mandatory reporters, like Mullins and PD.

Since MCL 722.624 establishes that non-mandatory reporters are permitted but not required to report abuse, then one interpretation of "under this act" is that non-mandatory reporters are also acting "under this act" when they report suspected child abuse or neglect. However, under that interpretation, the language of "under this act" in MCL 722.633(5) becomes mere surplusage since the criminalized behavior would extend to every conceivable scenario where abuse or neglect is reported. There would be no need to include the language "under this act" in the statute if a reporter—mandatory or non-mandatory—is always acting under the Child Protection Law when he or she makes

a report to DHHS or law enforcement. The interpretation that non-mandatory reporters always act under the Child Protection Law therefore runs contrary to well-established principles of statutory interpretation.

"[I]t is well established that in interpreting a statute we must avoid a construction that would render part of the statute surplusage or nugatory." *Robinson v City of Lansing*, 486 Mich 1, 21 (2010) (internal alterations omitted). Moreover, criminal statutes must be strictly construed in accordance with the rule of lenity. *People v Gilbert*, 414 Mich 191, 210-11 (1982). If all reports of suspected child abuse or neglect fall under the scope of the Child Protection Law, then the language of "under this act" in MCL 722.633(5) becomes surplusage or nugatory. It would be unnecessary and surplusage to define that only reports that are made "under the Child Protection Law" fall within the scope of MCL 722.633(5) if every possible report of suspected child abuse or neglect falls under the Child Protection Law. In other words, under the interpretations of the trial court and the Court of Appeals, it is impossible to report suspected child abuse or neglect without falling under the Child Protection Law. This interpretation makes the language "under this act" in MCL 722.633(5) mere surplusage.

This fact becomes apparent when you consider the statute in its current iteration and also under the Court of Appeals and trial court's interpretation. In its current iteration, MCL 722.633(5) reads in relevant part: "A person who intentionally makes a false report of child abuse or neglect under this act knowing that the report is false is guilty of a crime as follows . . . ."

The interpretation ascribed by the Court of Appeals and the trial court is such that whenever a person reports child abuse or neglect that he or she is always doing so "under the Child Protection Law." In essence, under the Court of Appeals and trial court's interpretation, MCL 722.633(5) effectively reads as follows: "A person who intentionally makes a false report of child abuse or neglect knowing that the report is false is guilty of a crime as follows . . . ."

The Court of Appeals attempted to evade the fact that it interpreted any meaning out of the language "under this act" by stating that the language "clarifie[d] that the activity criminalized by MCL 722.633(5) is the making of a specific report to CPS as authorized by the Child Protection Law, as opposed to some other kind of report not involving abuse or neglect of a child or made to some person or entity other than CPS or law enforcement." *People v Mullins*, 322 Mich App 151, 161 (2017) However, this interpretation ignores the fact that MCL 722.633(5) already makes clear that it only applies to reports of child abuse or neglect. Moreover, to the extent that the Court of Appeals claimed that its interpretation of "under this act" was consistent insofar as it only pertains to reports made to DHHS or law enforcement, the Court of Appeals itself rejected that interpretation by broadly applying MCL 722.633(5) to include reports made to those other than DHHS or law enforcement by affirming Mullins's conviction. In sum, the Court of Appeals improperly interpreted the language "under this act" to broadly cover literally every single report of child abuse or neglect while simultaneously and inconsistently suggesting that the language "under this act" was somehow limiting. This interpretation is inconsistent with the Child Protection Law and contrary to basic and long-standing principles of statutory interpretation that require strict construction of criminal statutes in the event of ambiguity. *Gilbert*, 414 Mich at 210-11.

The interpretation that MCL 722.633(5) does not create criminal liability for non-mandatory reporters is internally consistent with the Child Protection Law, ensures that each and every word of the statute has meaning, and complies with the doctrine of *in pari materia* by creating consistency with the remaining provisions of MCL 722.633. Subsections 1 and 2 create civil and criminal liability for mandatory reporters who fail to report suspected child abuse or neglect. MCL 722.633(1), (2). Subsection 3 creates civil and criminal liability for unauthorized dissemination of information and records of child abuse or neglect that is contained in DHHS records. MCL 722.633(3). Subsection 4 establishes a criminal liability for failing to expunge a record of abuse or neglect, which would largely

be applicable to mandatory reporters, law enforcement, or DHHS. MCL 722.633(4). As a result, the entirety of MCL 722.633 concerns mandatory reporters or DHHS protocols and procedures. Therefore, an interpretation that MCL 722.633(5) only creates criminal culpability for mandatory reporters is consistent with the Child Protection Law, is supported by the plain language of the statute, and comports with long-standing principles and canons of Michigan jurisprudence concerning statutory interpretation.

II. MCL 722.633(5) ONLY PROVIDES CRIMINAL CULPABILITY FOR THE PERSON WHO ACTUALLY PERSONALLY AND DIRECTLY CONTACTS DHHS OR LAW ENFORCEMENT.

MCL 722.633(5) establishes criminal culpability for a "person who intentionally *makes* a false report of child abuse or neglect." The district court, in initially refusing to bind over this matter to the circuit court for trial, correctly interpreted this statute to be limited to instances in which a person directly makes a false report of child abuse or neglect to DHHS or law enforcement. This interpretation is supported by two principle reasons. First, MCL 722.633(5) must be read *in pari materia* with MCL 750.411a, which establishes the crime of filing a false police report or 9-1-1 call, and MCL 750.411a includes a distinction between making a false report and causing a false report to be made. Second, the facts of the instant matter are too tenuous to support a theory that Mullins intentionally caused a false report of abuse or neglect because neither Mullins nor PD ever had any contact with the eventual person who actually filed the allegedly false report—Ms. Maher, the school principal.

MCL 750.411a and MCL 722.633(5) are incredibly similar statutes. Both statutes establish criminal penalties for falsely reporting criminal activity to law enforcement or certain governmental entities. However, these statutes differ in one critical aspect. MCL 750.411a(1) provides in relevant part, "a person who intentionally makes a false report of the commission of a crime, or intentionally causes a false report of the commission of a crime to be made . . . knowing the report is false, is guilty

of a crime as follows . . . ." This second clause "or intentionally causes a false report of the commission of a crime to be made" is absent from MCL 722.633(5).

The Court of Appeals refused to read these statutes *in pari materia* because the distinguishing language in MCL 750.411a was added by the Legislature in a subsequent enactment in 2004. *Mullins*, 322 Mich App at 165-66. The Court of Appeals based its refusal to read MCL 750.411a and MCL 722.633(5) *in pari materia* in part on this Court's opinion in *People v Watkins*, 491 Mich 450, 482 (2012), by relying on the fact that the additional language in MCL 750.411a was a subsequent enactment. *Mullins*, 322 Mich App at 166. However, there is a critical difference between enacting a new statute and amending a prior statute to resolve an existing ambiguity. In *Watkins*, the Court considered whether MCL 768.27a must be read in reference with MCL 768.27b, which contains an explicit reference to MRE 403, while MCL 768.27a does not. 491 Mich at 482. The Court resolved this issue by ultimately holding that it did not need to draw an inference from the subsequent legislation and ultimately held that evidence submitted to MCL 768.27a is still subject to exclusion pursuant to MRE 403. *Watkins*, 491 Mich at 482-86.

However, comparing MCL 750.411a with MCL 722.633(5) presents a different scenario, as it concerns a subsequent legislative enactment to clear up an ambiguity and to broaden the scope of MCL 750.411a. The Court of Appeals erred in refusing to consider the Legislature's decision to amend and broaden the scope of MCL 750.411a while leaving MCL 722.633(5) untouched as a purposeful decision. It is well-established that the Legislature's omission of language can be interpreted as purposeful. *See Bradley v Saranac Comm Schs Bd of Ed*, 455 Mich 285, 298 (1997) ("[T]his Court recognizes the maxim *expressio unius est exclusio alterius*, that the express mention in a statute of one thing implies the exclusion of other similar things."). The Legislature's decision to amend MCL 750.411a to make clear that it applies to situations other than those where a person directly files a false report while leaving MCL 722.633(5) supports legislative intent as to two different issues. First, that the Legislature

sought to limit the application of MCL 722.633(5) only to those who personally make reports. Second, since the application of MCL 722.633(5) would be limited only to those who personally make reports that it should be limited in application only to mandatory reporters for the reasons previously stated above. In reading MCL 722.633(5) *in pari materia* with MCL 750.411a, it is clear that only those who actually file a false report may be properly convicted for violating MCL 722.633(5).

In addition, the scope of MCL 722.633(5) is also limited by its plain language and is too tenuous to support a conviction under the facts of the present matter. MCL 722.633(5) makes it a crime for a person to intentionally "make" a false report of child abuse or neglect. The term "make" is not defined in the Child Protection Law. Black's Law Dictionary defines "make" as "to cause (something) to exist." *Black's Law Dictionary* (14th ed). When this definition is applied to MCL 722.633(5), the result is: a person who intentionally causes the existence of a false report of child abuse or neglect knowing that the report is false is guilty of a crime. A critical secondary question necessarily arises from this definition—what amount of action or inaction is required for a person to have satisfied the causal element.

"In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause." *People v Schaefer*, 473 Mich 418, 435 (2005), overruled in part on other grounds *People v Derror*, 475 Mich 316, 342 (2006), overruled in part on other grounds by *People v Feezel*, 486 Mich 184 (2010). "Factual causation exists if a finder of fact determines that 'but for' defendant's conduct the result would not have occurred." *Feezel*, 486 Mich at 194-195. Proximate cause "is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural." *Schaefer*, 473 Mich at 436. "For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a direct and natural result of the defendant's actions, and an intervening cause must not sever the causal link." *People v Laidler*, 491 Mich 339, 346 n2 (2012) (quotation marks and citation omitted). "The standard

by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability. . . . The linchpin in the superseding cause analysis, therefore, is whether the intervening cause was foreseeable based on an objective standard of reasonableness." *Schaefer*, 473 Mich at 437.

Applying these definitions and principles to the facts of the instant matter and MCL 722.633(5) leads to the conclusion that the phrase "intentionally makes a false report of child abuse or neglect" is not broad enough to encompass a circumstance in which a child is intentionally enlisted for the purpose of falsely accusing another of abuse or neglect to a mandatory reporter. The mandatory reporting requirements in MCL 722.623(1)(a) require that the mandatory reporter have "reasonable cause to suspect child abuse or child neglect" as a condition precedent to the triggering of a mandatory obligation to report. PD told her teacher, Ms. Fish, "Lou Dominion hurts me and has hurt my private parts." Appendix at 65a-66a. In response to that statement, Ms. Fish asked PD if anyone had told PD to say that to her and PD responded by saying, "God." Appendix at 68a. Ms. Fish followed up by asking PD whether she had been "spanked," and PD responded by saying, "yes." Appendix at 69a. Ms. Fish reported these statements to her principal, Jody Maher, who made a report to DHHS, which opened a CPS investigation into the matter. Appendix at 70a-71a, 74a-75a. MCL 722.623(1)(a)'s "reasonable cause" standard to trigger a reporting obligation dictates that mandatory reporters do not have to report bogus allegations concerning suspected child abuse or neglect. Ms. Fish was clearly skeptical of PD's statement, based on her use of her father's full legal name and the fact that her immediate suspicion regarding the origin of the statement. Ms. Fish's skepticism appears to have been further confirmed when PD indicated that "God" had told her to make the statement and PD's admission that Mr. Dominion had spanked her in the past. On these facts, no reasonable adult would have had reasonable cause to suspect that PD was the victim of child abuse or neglect. Spanking of a child is not child abuse. *See* MCL 750.136b(9) (permitting parents or guardians to use reasonable force

to reasonably discipline a child). Even assuming *arguendo* that Mullins had told PD to make a statement to her teacher, PD's actual statements and Ms. Fish's reaction were not reasonably foreseeable at the time the People's purported plan or scheme arose.

The following hypothetical is illustrative of how an individual's initial plan may succeed but we would skeptical of calling the result to be "made" by the planner. Consider a situation where a wife asks her husband in the morning to pick up dinner from their favorite Chinese restaurant on his way home from work. The husband, unsurprisingly, proceeds to work and completely forgets about his wife's request to pick up dinner over the course of the day. Upon leaving the office, the husband gets into his car and hears an advertisement on the radio for the favorite Chinese restaurant and decides to surprise the family with take out. The wife never suspects that the husband forgot her request and had an original thought just happened to coincide with her request. In this hypothetical, one would be skeptical of concluding that the wife "made" the husband pick up dinner for the family. While the end result was the same—the husband brought home Chinese food from the favorite restaurant, the wife's request for the husband to do so was not the driving factor. Similarly, PD's decision to tell Ms. Fish that Mr. Dominion had spanked her, as opposed to sexually abusing her, and Ms. Fish's decision to inform Ms. Maher to file a report to CPS sever the causal chain from Mullins's alleged purported plan.

United States v Giles, 300 US 41 (1937) confirms this point. In *Giles*, the defendant purposely withheld deposit slips to cover up his malfeasance. *Id.* at 44-45. The defendant even admitted "his purpose in withholding the deposit tickets was to prevent officers and examiners from discovering his shortage." *Id.* at 45. The defendant's stated purpose in withholding the deposit slips was to ensure that the bank's records would be false. *Id.* He knew that by withholding the deposit slips that the bookkeeper's records of the bank's accounts would be false. *Id.* The defendant directly provided incomplete and false information to the bookkeeper knowing that the bookkeeper would use this

information to generate false entries on the bank's ledger. *Id.* On these facts, the Supreme Court affirmed the conclusion that the defendant had "made" the false entries because they "were the intended and necessary result of respondent's deliberate action." *Id.* at 49.

The facts of *Giles* contrast sharply from the instant matter. *Giles* only had two players—the defendant and the bookkeeper. In *Giles*, the defendant directly influenced the actions of the bookkeeper; there were no intermediaries. As a result, the line of causation was far clearer than the instant circumstance. Unsurprisingly, the more intermediaries that are added, the more likely it is that the initial message will be distorted and the causal chain will be broken.[6] In the instant matter, there were at least 3 intermediaries between Mullins and DHHS—PD, Ms. Fish, and Ms. Maher. As a result, the causal chain is far more tenuous for Mullins than it was in *Giles*, and, indeed, was broken when PD informed Ms. Fish that she had been spanked Mr. Dominion—an action that does not constitute child abuse or neglect. Therefore, Mullins did not proximately cause a false report to be created and her conviction must be vacated.

III. IN ADOPTING THE CHILD PROTECTION LAW, THE LEGISLATURE ABROGATED THE COMMON LAW, INCLUDING THE APPLICATION OF THE DOCTRINE OF INNOCENT AGENT, AND MULLINS'S CONVICTIONS CANNOT STAND ON THAT BASIS.

At common law, there existed no duty for a person to contact law enforcement or a governmental agency under any circumstance nor was the any general duty to aid or protect another. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-99 (1988). In adopting the Child Protection Law, the Legislature clearly abrogated these traditional common law notions by imposing statutorily mandated duties for certain individuals to report suspected child abuse or neglect and penalties for

[6] The "telephone game" that many children play in elementary school is illustrative. The "telephone game" is a game where one person starts off with a simple message or sentence and then whispers the message to the next person, who conveys the message to the next person, and so on in a series, until the message has been passed along to all of the participants. Unsurprisingly (and sometimes to humorous effect), the message from the last person in the series is dramatically different from the initial one. The more participants in the game—the more dramatic the distortion in the message.

those who fail to discharge their statutory obligations. It's difficult to conceive of a more dramatic change from the common law, as the law in the State of Michigan went from no general duty to take any action to imposing a statutory mandate supported with criminal and civil penalties for failing to abide by these statutory duties. MCL 722.623(1)(a); MCL 722.633.

Importantly, the Michigan Constitution provides, "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Const 1963, art 3, § 7. In addition, MCL 8.3a requires that words in statutes be given their common meaning unless they are terms of art or are otherwise specifically defined. "[I]n the criminal-law context, common-law doctrine informs the meaning of a statute when the Legislature uses common-law terms." *People v Smith-Anthony*, 494 Mich 669, 677 (2013). Moreover, "[t]he abrogative effect of a statutory scheme is a question of legislative intent, and 'legislative amendment of the common law is not lightly presumed.'" *Dawe v Dr Reuven Bar-Levav & Assocs, PC*, 485 Mich 20, 28 (2010), quoting *Wold Architects & Engineers v Strat*, 474 Mich 223, 233 (2006). Thus, the entire statutory scheme of the Child Protection Law must be considered when evaluating whether the Legislature sought to abrogate the common law doctrine of innocent agent with regards to MCL 722.633(5).

As previously discussed, the Child Protection Law undoubtedly abrogated the common law in creating a comprehensive statutory scheme that created statutorily mandated duties for certain individuals to report suspected child abuse or neglect and civil and criminal penalties for failure to discharge those duties. The Court of Appeals erroneously summarily concluded that "[I]t is equally clear that the Legislature did not intend to change, amend, or repeal any aspect of the common law by enacting MCL 722.633(5)." *Mullins*, 322 Mich App at 163. The Court of Appeals erred by avoiding the fact that the act of filing a false report of child abuse or neglect was not a crime at common law. CPS and DHHS were not entities that existed at common law—they are modern administrative

agencies. The Child Protection Law created an entirely new statutory scheme to replace the common law, and MCL 722.633(5) reflects one of the statutorily-created offenses as part of the Child Protection Law. The Court of Appeals's reliance on *People v Hack*, 219 Mich App 299 (1996) and *People v Fisher*, 32 Mich App 28 (1971) are both misplaced, as both *Hack* (crimes of indecency) and *Fisher* (larceny) concerned offenses that existed at common law. Application of the common law to offenses that existed at common law is unremarkable. However, the Child Protection Law created new offenses that did not exist at common law, including MCL 722.633(5).[7] The Court of Appeals and the trial court erred in missing this important fact in ruling that the doctrine of innocent agent applied to MCL 722.633(5).

In light of the fact that legislative amendment of the common law is not lightly presumed, *Wold Architects & Engineers*, 474 Mich at 233, any legislative abrogation of the common law to create new criminal offenses must be narrowly interpreted. In other words, the Legislature's decision to abrogate the common law in enacting MCL 722.633(5) does not automatically require that the Legislature import other aspects of the common law, including the doctrine of innocent agent, which would expand the Legislature's abrogation by increasing the applicable criminal scope of MCL 722.633(5). Put another way, in enacting MCL 722.633(5), the Legislature abrogated the common law to create a new offense, but this abrogation must be narrowly construed only to the statutory language—absent an expression by the Legislature that it intended to import all other common law principles. By comparison, the Legislature also abrogated the common law in enacting MCL 750.411a, which makes it a criminal offense to make a false report of a crime. The Legislature's decision to include the additional language "or intentionally causes a false report of the commission of a crime to be made" in MCL 750.411a was an intentional and deliberate expression by the Legislature to import

[7] Counsel has been unable to locate any other case in Michigan jurisprudence that applied the doctrine of innocent agent to apply to a crime that did not exist at common law.

the common law doctrine of innocent agent to MCL 750.411a. The absence of similar language in MCL 722.633(5) indicates a clear legislative intent that in abrogating the common law to create the offense in MCL 722.633(5) that it wished to do so narrowly. This rationale is logical in light of the dramatic change from the common law brought about in enacting the Child Protection Law. Should the Legislature wish to import the doctrine of innocent agent to MCL 722.633(5), it is free to do so, as it has clearly done with MCL 750.411a. Therefore, the doctrine of innocent agent is inapplicable to MCL 722.633(5).

In conclusion, the Court should grant Mullins's application for leave to appeal and reverse her convictions. Mullins could not be charged or convicted of MCL 722.633(5), and her conviction on that offense must be vacated. Furthermore, Mullins's conviction of MCL 750.145 must also be vacated because MCL 750.145 is a misdemeanor offense that should have remained in the jurisdiction of the district court as opposed to the circuit court. Moreover, the evidence presented at trial concerning MCL 722.633(5) would not have been presented to the jury—much of which was highly prejudicial, such as the evidence concerning Mullins's past involvement with CPS—and undermines the reliability of the jury's verdict on that charge, requiring a new trial on that count as well.

RELIEF REQUESTED

WHEREFORE Defendant-Appellant Shae Lynn Mullins respectfully requests that this Honorable Court grant her Application for Leave to Appeal, vacate Defendant-Appellant's convictions, and reverse and remand this matter for a new trial.

Respectfully Submitted,

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